Supreme Court, U.S.
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No. 93-5131

In The

Supreme Court of the United States

October Term, 1993

PAUL PALALAUA TUILAEPA,

Petitioner,

vs.

CALIFORNIA,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of California

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Is California's death penalty statute as written and applied impermissibly vague, in violation of the Eighth Amendment, because it permits the sentencer to consider (a) the unadorned "circumstances of the crime" aggravating factor, with no guidance whatsoever; (b) the prior violent criminal activity aggravating factor, without any instruction as to the penal statutes that may have been violated; and (c) the age of the defendant as an aggravating factor, no matter what the defendant's age may be?

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BRIEF FOR PETITIONER

CITATION TO OPINION BELOW

The opinion of the California Supreme Court is reported as *People v. Tuilaepa*, 4 Cal.4th 569, 842 P.2d 1142 (1992), and is located in the Joint Appendix, pages 68-105 (hereinafter "JA ___").

JURISDICTION

The judgment of the California Supreme Court was entered on December 28, 1992. A petition for rehearing was denied on March 10, 1993. The petition for writ of certiorari was filed on July 8, 1993, and granted on December 6, 1993. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1275(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth Amendment to the United States Constitution, which forbids the infliction of "cruel and unusual punishment."

2. It also involves the Fourteenth Amendment to the United States Constitution, which provides in pertinent part that no state may "deprive any person of life- . . . without due process of law. . . . "

3. Also involved are California Penal Code sections 190.2 and 190.3, part of the capital punishment statute in California. These code sections are attached as the Appendix to this brief.

STATEMENT OF THE CASE

Petitioner was convicted and sentenced to die for the October 6, 1986 murder of Melvin Whiddon during the course of an armed robbery at the Wander Inn Tavern in Long Beach, California. On that date, two men entered the tavern, demanded money, and began robbing the customers. Whiddon, a patron sitting at the bar, struck one of the robbers and a fight ensued. The second robber responded by fatally shooting Whiddon. He also shot and seriously injured three other patrons as he and his accomplice exited the bar. Petitioner was identified at trial as the second robber. JA 69-72.

Under California law, a defendant may not be sentenced to death unless convicted of first-degree murder with a finding of a statutory "special circumstance." California Penal Code § 190.2.[1] At petitioner's trial, the jury found petitioner guilty of first degree murder and found true the special circumstance that the murder was committed while petitioner was engaged in the commission

[1] The existence of a special circumstance is determined as part of the guilt phase proceedings. Cal. Pen. Code § 190.1. All statutory references are to the California Penal Code unless otherwise noted.

of a robbery. Clerk's Transcript, page 208 (hereinafter "CT ___").

At a penalty trial before the same jury, the prosecutor introduced evidence of various incidents of in-custody misconduct by petitioner, all but one of which occurred during the four years that petitioner was detained in a California Youth Authority ("CYA") facility. The CYA incidents included destruction of property (Reporter's Transcript, Vol. 4, pages 781-82 (hereinafter "RT ___"), two fights (RT 4:720-26; 765, 779), possession of taped-together flashlight batteries (RT 4:754-55), possession of an unauthorized number of razor blades (RT 4:752-53), tossing a liquid against a screened area of his cell (RT 4:741), yelling obscene and/or otherwise obnoxious taunts and alleged threats at his counselors (RT 4:729-31; 740-41), and possession in his cell of "contraband" ("gang writings"). RT 4:670, 754.[2]

The defense introduced the testimony of a psychologist concerning petitioner's low IQ (in the low 70's), depression, and difficulties in mastering English after moving to California from Samoa. In his early years, petitioner spoke Samoan almost exclusively. After the eighth grade, his schooling was only in various institutional settings. RT 4:826-29. Petitioner's 66-year-old mother, Menoa, who had never learned to speak English, testified through an interpreter that petitioner, the youngest of 12 children, had been well behaved as a child and had only gotten into trouble with friends at age 14 or 15,

[2] The non-CYA incident involved the robbery of an inmate in the courthouse lockup while waiting for trial. RT 4:803-05.

after the family had moved to California. It was around the age of 14 or 15 that petitioner was first "taken away" from her. RT 4:808-12. The family had serious difficulties during the few years before the trial, including the death of petitioner's father and the murder of one of petitioner's brothers. RT 4:810, 815. Petitioner had helped to care for another of his brothers who was paralyzed after being shot in the back. RT 4:814. Petitioner's sister, Sarita, testified that she and her family, many of whom attended court daily, loved and cared for petitioner and wanted his life to be spared. RT 4:820-21.

The trial court instructed the jury that there were five factors which it was to weigh and be guided by in determining if petitioner should die:

> [(a)] The circumstances of the crime in which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true;
>
> [(b)] The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence;
>
> [(c)] The presence or absence of any prior felony conviction;
>
> [(i)] The age of the defendant at the time of the crime.
>
> [(k)] Any other circumstance which extenuates the gravity it [sic] of the crime, even though it is not a legal excuse for the crime. ¶ And any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death whether or not related to the offense for which he is on trial.

JA 60-61; RT 4:885.[3]

The court, after again reminding the jury that it was to be guided by the foregoing "aggravating and mitigating circumstances," told the jury that "in weighing [the] aggravating and mitigating circumstances," it was "free to assign whatever moral and sympathetic value [it] deem[ed] appropriate." RT 4:886-87. Finally, the jury was told that "[i]n weighing the various circumstances," it was to determine which penalty is justified,

> by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances.
>
> To return a judgment of death, each of you must be persuaded that the aggravating evidence is so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

JA 63; RT 4:886-87.

The trial court did not provide any guidance as to what came within the scope of the "circumstances of the

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[3] As read to the jury, these factors were labeled "A" through "E." RT 4:885. To facilitate the Court's consideration of the issues raised in this and the companion case of *Proctor v. California*, No. 93-5161, *cert. granted*, 12/6/93, petitioner has altered the lettering to make the factors correspond to the statutory sentencing factors appearing in Cal. Pen. Code § 190.3. Six of the standard section 190.3 factors were not submitted to petitioner's jury. This was done by agreement of the parties, in recognition of the fact that the omitted factors were irrelevant in light of the trial evidence. RT 4:785-87.

crime" factor, or how the jury was to determine whether the factor was mitigating or aggravating. Nor did the court give any instructions to help the jury determine whether any alleged misconduct involved "criminal" or "violent" activity, or any instruction as to how or why petitioner's "age" might be an aggravating factor.

The prosecutor, in closing argument, relied upon factors (a), (b) and (i) as aggravating circumstances. As to factor (a), he urged that the serious injury to the three surviving victims, a purported smile on petitioner's face during the shootings, and the fact that the crime occurred while the victims were in a bar watching Monday night football and so could "have been any one of us" made the "circumstances of the crime" an aggravating factor. JA 7, 25-27; RT 4:837, 853-57. As to factor (b), the prosecutor relied upon the various incidents of in-custody misconduct. JA 19-24; RT 4:848-52. As to factor (i), the prosecutor argued that petitioner, whom he described as being "in his early twenties," was "old enough . . . to have spent some time incarcerated" and "[s]o, in a criminal sense, . . . ha[d] a certain maturity which belies his years"; and further, that petitioner "was old enough to decide to plan as well as commit a robbery. . . . [;] . . . had enough maturity, enough sophistication to plan and execute a robbery. . . . " JA 11-14; RT 4:841-43.[4]

The prosecutor focused the jury's attention on the fact that the jury's task was to weigh aggravating circumstances against mitigating circumstances. The prosecutor

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[4] Petitioner was 20 or 21 years old at the time of the crime. JA 51; RT 4:877.

quoted the instructional language noted above directing the jury to reach its verdict "by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances [, and deciding whether] the aggravating evidence is so substantial in comparison with the mitigating circumstances that it warrants death," and the prosecutor characterized this weighing process as "pretty much the essence of the case." JA 8-9; RT 4:839.

Defense counsel's argument also underlined the central importance of the weighing process, noting three times that: "In order to return a verdict of death, you – each of you must be persuaded that the circumstances in aggravation so outweigh the circumstances in mitigation as to warrant the death penalty"; "the aggravating circumstances must so substantially outweigh the mitigating circumstances in order to render a verdict of death" (JA 37; RT 4:864); and "[a]gain, you must be persuaded that the aggravating circumstances are so substantial in nature, are so substantial in comparison with the mitigating circumstances." JA 43; RT 4:870.

The trial court provided the jury with two alternative verdict forms, each of which emphasized the central importance of weighing the aggravating circumstances against the mitigating:

> We, the jury in the above-entitled action, FIND the *aggravating circumstances substantially outweigh the mitigating circumstances* and that the defendant PAUL PALALAUA TUILAEPA should have imposed the sentence of death on him.

JA 66; CT 225 (emphasis added).

> We, the jury in the above-entitled action, FIND that the *aggravating circumstances do not substantially outweigh the mitigating circumstances* and that the defendant PAUL PALALAUA TUILAEPA should have imposed on him confinement in the State Prison for LIFE WITHOUT THE POSSIBILITY OF PAROLE.

JA 67; CT 226 (emphasis added).

After nearly three days of deliberations,[5] the jury found that the aggravating circumstances substantially outweighed the mitigating circumstances and returned the signed verdict of death. JA 66; CT 225; RT 4:892.

On direct appeal to the California Supreme Court, petitioner argued that factors (a), (b), and (i) were unconstitutionally vague in violation of the Eighth Amendment standards which this Court has applied to aggravating circumstances weighed in the capital sentencing process. The state court, "[a]ssuming without deciding" that factors (a), (b), and (i) are "subject to such 'vagueness' concerns," ruled that these factors were not impermissibly vague. JA 98; *People v. Tuilaepa, supra*, 4 Cal.4th at 594-95.

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[5] The jury had difficulty reaching its verdict. On the second day of deliberations, it sent to the trial court the following note, signed by the jury foreperson: "We the jury of 12 have *not* come to a unanimous 12-0 verdict. After 8 1/2 hours of deliberations we feel that further deliberations will not make any difference." JA 65; CT 216 (emphasis in original).

SUMMARY OF ARGUMENT

When a state chooses to impose capital punishment, the Eighth Amendment requires a scheme which makes all reasonable efforts to ensure that the death penalty is not meted out in an arbitrary or capricious manner. Although the Eighth Amendment does not require states to use "aggravating factors" to reach this goal, when the state *does* elect to make such factors central in determining who shall die – as where it requires the sentencer to weigh aggravating and mitigating factors in determining punishment – it may not place vague or illusory aggravators on death's side of the scale.

The instructions, arguments and jury verdicts given to petitioner's jury in this case made clear that the jury was to decide if petitioner should die by weighing aggravating and mitigating factors. Thus, under the Eighth Amendment, the state could not allow the jury to weigh vague or illusory aggravating factors.

Three of the aggravating factors relied upon in this case were impermissibly vague. First, the jury was allowed to formally weigh as an aggravating factor the "circumstances of the crime." Instructions in the bare language of this aggravating factor do not provide the type of specific and detailed guidance required of an aggravating factor. The jury was given no instruction as to what came within the scope of the "circumstances of the crime" aggravating factor, nor any guidance as to what particular "circumstances" society deemed particularly blameworthy. Instead, it was left in the jury's unguided discretion to determine if the "circumstances of

this crime" were sufficiently egregious to constitute an aggravating factor.

Second, the jury was told it could weigh in aggravation "the presence or absence of criminal activity by the defendant which involved the use or threatened use of force or violence. . . . " The jury was not given any instructions as to what constituted "criminal activity" or "violence." In the absence of such instructions, opinions on what constitutes "criminal activity," or "violence" will necessarily vary from juror to juror and jury to jury. Thus, this aggravating factor also failed to provide the type of specific and detailed guidance required in an aggravating factor.

Finally, the jury was allowed to weigh in aggravation petitioner's "age at the time of the crime." The jury was given no guidance as to how or why the petitioner's age might legitimately serve as an aggravating factor. The state supreme court's construction of the "age" factor, albeit never communicated to the sentencing jury, has served only to render this factor all the more impermissibly vague.

Because the presence of even one invalid aggravating factor injects Eighth Amendment error into petitioner's death sentence, the sentence must be reversed and the case remanded.

ARGUMENT

I. The Aggravating Factors Which the Jury Was Explicitly Told to Weigh in Determining if Petitioner Should Live or Die Are Subject to Eighth Amendment Vagueness Limitations

A. In Order To Comply with the Eighth Amendment's Fundamental Proscription against Arbitrary Imposition of the Death Penalty, when a State Requires Its Sentencers To Balance Aggravating and Mitigating Factors in Determining Who Shall Die, It May Not Place Vague Aggravators on Death's Side of the Scale

Perhaps the most fundamental premise underlying this Court's Eighth Amendment capital jurisprudence over the last 25 years has been the Court's repeated observation that death is a unique punishment. *See, e.g., Lewis v. Jeffers*, 497 U.S. 764, 774 (1990); *Tison v. Arizona*, 481 U.S. 137, 149 (1987); *California v. Ramos*, 463 U.S. 992, 998-999 (1983); *Beck v. Alabama*, 447 U.S. 625, 638 (1980); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Gardner v. Florida*, 430 U.S. 349, 357 (1977); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Gregg v. Georgia*, 428 U.S. 153, 181-188 (1976); *Furman v. Georgia*, 408 U.S. 238, 306-310 (1972) (Stewart, J., concurring). *See also Harmelin v. Michigan*, 501 U.S. ___, 115 L.Ed.2d 836, 868 (1991) (Kennedy, J., concurring). The Court has repeatedly relied on this fundamental premise to hold that when a state chooses to impose capital punishment, it must utilize procedures that insure the sentence is not meted out in an unreliable, arbitrary manner.

In the earliest application of this principle, the Court held that the Eighth Amendment's proscription against

arbitrary imposition of the death penalty was violated by a capital sentencing scheme which did not provide a meaningful basis for selecting those defendants who would receive a death sentence. *Furman v. Georgia, supra,* 408 U.S. 238. In the years since *Furman* the Court has continued to show its concern "that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." *Eddings v. Oklahoma,* 455 U.S. 104, 118 (1982) (O'Connor, J., concurring).

There is, of course, no single scheme a state must adopt to meet its constitutional obligations. *Spaziano v. Florida,* 468 U.S. 447, 464 (1984); *Baldwin v. Alabama,* 472 U.S. 372, 389 (1985). Some states have opted to require the sentencer to find and weigh certain aggravating factors as a means of minimizing the arbitrary imposition of the death penalty. In order to fulfill this goal, however, such aggravating factors may not be "so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." *Espinosa v. Florida,* 505 U.S. ___, 120 L.Ed.2d 854, 855 (1992).

In *Godfrey v. Georgia,* 446 U.S. 420, 428 (1980), the Court explained that where a state relies on aggravating factors to make a defendant death-eligible, the factors must furnish the sentencer with "clear and objective standards" that provide "specific and detailed guidance." Under the Georgia scheme, the absence of such guidance in an aggravating factor used to determine death eligibility – as where the aggravating factor requires the sentencer to examine the circumstances of the crime to

determine if it was "outrageously or wantonly vile, horrible or inhuman" – would inject the precise risk of arbitrary and capricious action condemned in *Furman. Godfrey v. Georgia, supra,* 446 U.S. at 428-33.

In the years since *Godfrey,* the Court has never suggested that the approach used in *Godfrey* to evaluate the propriety of aggravating factors is somehow limited to schemes which, like Georgia, limit the use of aggravating factors to determining whether a defendant is eligible for the death penalty. To the contrary, the Court has time and time again applied *Godfrey* to gauge the propriety of a challenged aggravating factor even where the factor actually played *no* role in determining if the defendant was death-eligible, but was solely used in the weighing process leading to death. The Court's analysis has always been grounded on the fact that, if a state requires the sentencer to weigh aggravating and mitigating factors in determining if a defendant should live or die, it may not place vague aggravating factors on death's side of the scale.

For example, in *Maynard v. Cartwright,* 486 U.S. 356 (1988), Justice White, writing for a unanimous Court, addressed the propriety of an aggravating factor under the Oklahoma capital sentencing scheme. Under the Oklahoma scheme, all persons convicted of murder are eligible for the death penalty. However, a defendant cannot be sentenced to death unless the jury finds at least one aggravating factor at a separate penalty phase. At that point, the jury is required to weigh the aggravating and mitigating factors and decide whether to sentence the defendant to death.

In *Maynard*, defendant was convicted of murder and the jury found two aggravating factors. Before this Court, defendant argued that one of those factors – the "especially heinous, atrocious or cruel" factor – was vague under *Godfrey*. Of course, because the defendant in *Maynard* was plainly death-eligible under Oklahoma law by virtue of an *unchallenged* aggravating factor, the only role served by the *challenged* aggravating factor was as a weight on death's side of the scale in the actual weighing process. Nevertheless, in *Maynard*, the Court applied the *Godfrey* test to hold that the challenged aggravating factor used in the weighing process was unconstitutionally vague. 486 U.S. at 363-364.

The Court has taken this identical approach on a number of occasions, repeatedly applying *Godfrey* to assess the constitutionality of factors which, in the context of the cases before the Court, had no role in rendering the defendant death-eligible but were relevant only to the weighing process mandated under state law. *Arave v. Creech*, 507 U.S. ___, 123 L.Ed.2d 188 (1993) (*Godfrey* applied to assess constitutionality of aggravating factor where unchallenged aggravators remained to make defendant death-eligible); *Espinosa v. Florida*, 505 U.S. ___, 120 L.Ed.2d 854 (1992) (same); *Walton v. Arizona*, 497 U.S. 639 (1990) (same). In all these cases, the defendants were death-eligible by virtue of unchallenged aggravating factors. Thus, for purposes of appeal under the state schemes at issue, the only role of the challenged aggravating factor was in the weighing process that resulted in a death sentence. Nevertheless, the *Godfrey* test was applied in all cases.

State courts throughout the country have reached this same result, uniformly recognizing that *Godfrey* applies to aggravating factors used in the penalty determination even where the defendant has been properly found death-eligible at the guilt phase. *See, e.g., Wilson v. State*, 751 S.W.2d 734, 737-39 (Ark. 1988); *State v. Breton*, 562 A.2d 1060, 1063-66 (Conn. 1989); *Haney v. State*, 603 So.2d 368, 387 (Ala. 1991); *State v. Ramseur*, 524 A.2d 188, 224-25 (N.J. 1987).

The longstanding rule applied in *Maynard, Creech, Espinosa* and *Walton*, as well as in state courts throughout the country, was the basis for analysis of the Mississippi statute by the Court in *Stringer v. Black*, 503 U.S. ___, 117 L.Ed.2d 367 (1992). There, the Court addressed an aggravating factor weighed by the jury under the Mississippi scheme.

Under Mississippi law, a defendant is not eligible for the death penalty unless found guilty of capital murder, a category narrower than the general category of murder. In fact, capital murder is limited to seven specific crimes. Miss. Code Ann. § 99-3-19(2).[6] In light of these statutes, and prior to *Stringer*, the Mississippi Supreme Court had made clear in no uncertain terms that, under state law, the "constitutionally required narrowing of the class of persons eligible for the death penalty is accomplished by

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[6] The crimes which can carry the death penalty in Mississippi are limited to murder (1) of a police officer, (2) by a person under sentence of life imprisonment, (3) by the use of a bomb or explosive device, (4) for hire, (5) in the course of several enumerated felonies, (6) during the felonious abuse of a child and (7) of an elected official.

the legislative definition of capital offenses in the guilt phase. . . . " *Ladner v. State*, 584 So.2d 743, 763 (Miss. 1991).

After this narrowing has taken place and a defendant has been convicted of capital murder, the statute provides that the defendant receives a separate sentencing hearing at which the jury determines whether any of eight statutory aggravating factors exist. Miss. Code Ann. § 99-19-101. If the jury finds one of these eight factors, it must then determine if there are any mitigating factors "which outweigh the aggravating circumstances found to exist." Miss. Code Ann. § 99-19-101(2)(c). "Based on these considerations [the jury is to determine] whether the defendant should be sentenced to life imprisonment or death." Miss. Code Ann. § 99-19-101(2)(d).

In *Stringer* itself the defendant was convicted of capital murder because the killing fit within one of the seven designated categories. At the separate sentencing hearing, the jury found three statutory aggravating factors. Before this Court, petitioner argued that because *one* of these aggravating factors – authorizing a death sentence if the murder was "especially heinous, atrocious or cruel" – was unconstitutionally vague, his death sentence was infected with constitutional error. Stringer argued that *Godfrey* and *Maynard* applied to Mississippi's aggravating factors.

In contrast, the State of Mississippi contended that because the narrowing function that made a defendant death-eligible in Mississippi was performed at the guilt phase, there was no impropriety in relying on a vague

factor which merely guided the jury's discretion at the sentencing phase:

> [I]t is obvious that the Mississippi scheme provides the constitutionally required narrowing during the guilt phase. The separate sentence determination process, in which aggravating factors are found, is not part of the constitutionally required narrowing function. . . . The fact that the weighing process occurs after the constitutionally required narrowing takes place decreases its importance in the determination of the sentence. In fact, it takes it out of the realm of a weighing statute.

Stringer v. Black, No. 90-6616, Brief of Respondent at 29.

This Court explicitly rejected that argument. The Court first noted that under Mississippi law, jurors were required to weigh aggravating and mitigating factors. *Stringer, supra*, 117 L.Ed.2d at 378. The Court explained that *Godfrey* and *Maynard* applied not only to those circumstances that made a defendant death-eligible, but they also applied to those aggravating factors which were used solely in the weighing process:

> [I]f a state uses aggravating factors in deciding who shall be eligible for the death penalty *or* who shall receive the death penalty, it cannot use factors which as a practical matter fail to guide the sentencer's discretion.
>
> * * *
>
> . . . Although our precedents do not require the use of aggravating factors, they have not permitted a State in which aggravating factors are decisive to use factors of vague or imprecise content. A vague aggravating factor employed

> for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. *A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance.*

Stringer v. Black, supra, 117 L.Ed.2d at 381-82 (emphasis added).[7]

Consistent with this Court's practice in *Maynard, Creech, Espinosa* and *Walton,* as well as the general approach used by state courts throughout the country, *Stringer* held that the Mississippi statute was subject to

[7] Not only was this argument rejected in *Stringer,* it was also rejected in *Clemons v. Mississippi,* 494 U.S. 738 (1990). There, the Court was addressing Mississippi's "heinous, atrocious or cruel" aggravating factor. As it did in *Stringer,* the State of Mississippi argued that its aggravating factors were immune from Eighth Amendment scrutiny because the required narrowing process was performed at the guilt phase:

> "Even given Mississippi's broadened construction of the especially heinous aggravating circumstance, . . . the Mississippi capital murder statute still narrows the class of persons eligible for the death penalty. The definition of capital murder in Mississippi serves the . . . narrowing function. . . . "

Clemons v. Mississippi, No. 88-6873, Brief of Respondent at p. 57.

As Justice Blackmun's separate opinion in *Clemons* makes clear, the Court unanimously rejected this argument, holding that Mississippi's "heinous, atrocious or cruel" aggravating factor violated the Eighth Amendment. 494 U.S. at 756, n.1. *Accord Stringer v. Black, supra,* 117 L.Ed.2d at 381 (holding that "as a matter of federal law" it was "so evident" that *Godfrey* applied to Mississippi's aggravating factors that "the issue was not even mentioned in *Clemons.*").

the *Godfrey/Maynard* analysis. Where a state chooses to have aggravating factors play a formal role in the sentencing process, the factors must comply with *Godfrey* and *Maynard.*

The principle applied in *Stringer* is entirely consistent with the underlying thrust of the Court's capital jurisprudence. As Justice Kennedy noted for the Court in *Stringer,* the use of a vague aggravating factor in the weighing process is worse than the use of such a factor to determine death eligibility, for at the penalty selection stage, the vague factor creates the risk of an arbitrary death judgment predicated on an "illusory circumstance." In light of the Eighth Amendment's proscription against cruel and unusual "punishment," it would be anomalous indeed to hold that where a state requires a sentencer to weigh aggravating and mitigating factors in actually determining a defendant's punishment, the state is free to place unconstitutionally vague aggravating factors on death's side of the scale.

To the contrary, *Stringer* makes clear that the central feature of the Mississippi statute was that the "aggravating factors are critical in the jury's determination whether to impose the death penalty." *Stringer v. Black, supra,* 117 L.Ed.2d at 381. In this respect, as more fully discussed below, the scheme used at petitioner's trial was identical to that used in Mississippi.

B. The Instructions Given To The Jury in this Case Made Clear that Aggravating Factors Played a Critical Role in the Jury's Decision To Impose Death

Just as at a Mississippi trial, at petitioner's trial the instructions commanded the jury, in determining whether the defendant should live or die, to weigh the aggravating and mitigating circumstances on which it had been instructed. JA 62-63; RT 4:886-87.[8] As the verdict forms in petitioner's case make clear, the jury could not return a verdict without first determining the relative weight of the aggravating and mitigating circumstances. If the aggravating circumstances substantially outweighed the mitigating circumstances, the jury was to return a death sentence. JA 66; CT 225. If the aggravating circumstances did not substantially outweigh the mitigating circumstances, the jury was to return a sentence of life without the possibility of parole. JA 67; CT 226. The trial court's instructions and verdict forms made clear that the jury's

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[8] The operative and concluding words of the jury instructions were:

> In weighing the various circumstances, you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances.
>
> To return a judgment of death, each of you must be persuaded that the aggravating evidence is so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

JA 63; RT 4:887.

decision was to be controlled by the weighing of aggravating and mitigating factors.[9]

Thus, the aggravating factors set forth in the instructions to petitioner's jury served the identical function as Mississippi's aggravating factors discussed in *Stringer*. Under both schemes, these factors played a critical role in guiding the sentencer's discretion in determining whether death was to be imposed. The aggravating factors at petitioner's trial – just as at a Mississippi trial – were "central in the weighing phase of a capital sentencing proceeding." *Stringer v. Black, supra*, 117 L.Ed.2d at 383.

Indeed, since 1983, this Court itself has repeatedly recognized the central role played by aggravating factors under the California scheme. For example, in *California v. Ramos*, 463 U.S. 992, 995 n.3, and 1008 n.22 (1983), in the course of upholding the constitutionality of accurate instructions explaining the Governor's commutation power, the Court noted that the California statute requires instructions on aggravating and mitigating circumstances and that the jury may impose death only if the "aggravating circumstances outweigh the mitigating circumstances."

Similarly, in *California v. Brown*, 479 U.S. 538, 540 (1987), in which the Court held that the Eighth Amendment did not preclude an instruction advising the jury not to be swayed by "mere sympathy," the Court noted

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[9] As noted above, the arguments of both counsel also focused the jury's attention on the central importance of this weighing process.

again that the California sentencer was to "consider aggravating and mitigating circumstances and to weigh them in determining the appropriate penalty."[10] Three years later, in holding that the Eighth Amendment did not preclude a state from requiring a sentencer to impose death if aggravating factors outweighed mitigating factors, the Court once again acknowledged that the California scheme required the sentencing jury, in reaching its decision, to weigh the aggravating circumstances against the mitigating circumstances. *Boyde v. California*, 494 U.S. 370, 374 and 377 (1990).

More recently, at least two members of the Court have again noted that the California scheme is one which "requires its juries to weigh aggravating and mitigating circumstances" in determining whether death is the appropriate punishment. *Pensinger v. California*, 502 U.S. ___, 116 L.Ed.2d 290 (1991) (O'Connor, J., joined by Kennedy, J., dissenting from a denial of certiorari). In light of the instructions and verdict forms given in this case – the latter telling the jury that it could impose death only if it found that "aggravating circumstances substantially outweigh the mitigating circumstances" – it seems clear that the scheme used at petitioner's trial was just like the scheme considered in *Stringer* and *Clemons*.

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[10] The dissenting opinion in *Brown* also noted that under the California statute, as construed by the state supreme court, " 'matters not within the statutory list are not entitled to any weight in the penalty determination.' *People v. Boyd*, 38 Cal.3d 762, 773, 700 P.2d 782, 790 (1985)." *Id.* at 560 (Brennan, J., dissenting). The exclusivity of the listed factors also reinforces the central role of the statutory aggravating circumstances.

The only identifiable difference between the Mississippi system and the scheme articulated in the instructions at petitioner's trial is that in Mississippi, unlike at petitioner's trial, the jury must make a threshold finding that at least one aggravating factor exists before it can impose the death sentence. That difference is simply irrelevant to the analysis under *Stringer*. As *Stringer* was careful to point out, the use of a vague aggravating factor is improper "in deciding who shall be eligible for the death penalty *or* who shall receive the death penalty. . . . " *Stringer v. Black, supra*, 117 L.Ed.2d at 381 (emphasis added).

Thus, the central feature of the Mississippi statute was its reliance on aggravating factors as "critical in the jury's determination whether to impose the death penalty." *Stringer v. Black, supra*, 117 L.Ed.2d at 382. As discussed above, the instructions, argument and verdict forms in this case demonstrate beyond any doubt that aggravating factors were critical to the jury's decision whether petitioner would live or die.

Indeed, the state supreme court has itself long recognized the critical role played by aggravating factors under the California capital sentencing scheme. *See, e.g., People v. Easley*, 34 Cal.3d 858, 883, 671 P.2d 813 (1983); *People v. Boyd, supra*, 38 Cal.3d at 773, 700 P.2d 782 (1985); *People v. Hovey*, 44 Cal.3d 543, 583, 749 P.2d 776 (1988); *People v. Kaurish*, 52 Cal.2d 648, 706, 802 P.2d 278 (1990). The state court has stated that the role of aggravating factors under the California scheme was "essentially equivalent" and "almost identical" to that of aggravating factors in the Florida capital sentencing scheme. *See, e.g., People v. Frierson*, 25 Cal.3d 142, 180, 599 P.2d 587 (1979); *People v. Brown*, 40 Cal.3d 512, 542-544, 709 P.2d 440

(1985), *rev'd.* on other grounds *sub nom, California v. Brown*, 479 U.S. 538 (1987). The standards established in *Godfrey* and its progeny must apply to the aggravating factors upon which the jury was instructed at petitioner's trial.

As noted above, on petitioner's direct appeal, the state supreme court assumed without deciding that these standards applied to the aggravating circumstances upon which petitioner's jury was instructed, but found that the challenged factors – factors (a), (b), and (i) – satisfied those standards. Until very recently, the state court had taken varying positions on the question of whether the Eighth Amendment vagueness standards of *Godfrey* and *Maynard* apply to California's aggravating factors.

In one case, the court recognized that the aggravating factors which a jury is instructed to weigh when determining whether a defendant should live or die, must meet those standards, citing *Walton v. Arizona, supra*, 497 U.S. at 653. *People v. Visciotti*, 2 Cal.4th 1, 74, 825 P.2d 388 (1992). In yet another case, the court concluded that these standards did not apply to California's aggravating factors at all, citing *Zant v. Stephens*, 462 U.S. 862, 878 (1983). *People v. Bacigalupo*, 1 Cal.4th 103, 148, 820 P.2d 559, *cert. granted, vacated* and *remanded*, 121 L.Ed.2d 5 (1992). In other cases, as in petitioner's case, the California court assumed, without deciding, that they applied, but held that the factors were not vague. *See People v. Noguera*, 4 Cal.4th 599, 649, 842 P.2d 1160 (1992); *People v. Sims*, 5 Cal.4th 405, 465-66, 853 P.2d 992 (1993); and *People v. Cudjo*, 6 Cal.4th 585, 637, ___ P.2d ___ (1993).

But in a case decided the day after certiorari was granted in petitioner's case, the state court, over a piercing dissent, has taken a definitive position that the vagueness standards of *Godfrey* and *Maynard* simply do not apply to California's aggravating factors. *People v. Bacigalupo*, 6 Cal.4th 457, ___ P.2d ___ (1993) (hereinafter sometimes "*Bacigalupo II*"). As the dissent pointedly notes, *Bacigalupo II* case is clearly wrong. *Id.* at 484-93 (Mosk, J., dissenting).[11]

The court's rationale in *Bacigalupo II* appears to be, first, that the vagueness standards of the Eighth Amendment, as elucidated in *Godfrey* and *Maynard*, apply only to criteria that render a defendant eligible for death, and do not apply to factors which the jury actually weighs in deciding whether the defendant should live or die. *Id.* at 475-476. This rationale is incorrect.

Indeed, it is plainly inconsistent with *Stringer*, which recognized that if a state "uses aggravating factors in deciding . . . who shall receive the death penalty, it cannot use factors which as a practical matter fail to guide the sentencer's discretion." *Stringer, supra*, 117 L.Ed.2d at 381.[12] It is also plainly inconsistent with numerous other

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[11] Concurring in the judgment, but dissenting from the majority's rationale, Justice Mosk wrote, "In sum, the majority and concurring justice cannot 'deconstruct' *Stringer* by denying either the existence of the Eighth Amendment's proscription against vague aggravating factors or its applicability to California death penalty law." *Id.* at 491.

[12] The California court assumed that the constitution's narrowing requirement is met by California's special circumstances and, therefore, there is no need for any further narrowing at the penalty selection phase. This assumption is itself open to

decisions of this Court which, as demonstrated above, have consistently applied Eighth Amendment vagueness

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serious question. As enacted by public initiative process in 1978, California's death penalty statute establishes 29 special circumstances that render a defendant eligible for the death penalty, and they encompass nearly every conceivable form of first-degree murder, including 11 types of felony-murder. *See* Cal. Pen. Code § 190.2; Appendix A. The explicit intent of the voters and proponents behind the statute was *not* to reduce the category of murderers eligible for the death penalty, but to expand or broaden it as much as possible.

Indeed, the information booklet distributed in 1978 to California voters, who enacted the present death penalty law, argued that the old death penalty law, which had been enacted by the Legislature a year earlier, should be replaced by the new version, known as Proposition 7, "[b]ecause the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would." *1978 Voters' Pamphlet*, p. 34, "Argument in Support of Proposition 7."

The legislative effort to continually expand the categories of homicide for which California defendants will be death-eligible continues unabated. On January 4, 1994, Assembly Bill 2443 was introduced. It proposed a brand-new special circumstance section for murder by "discharging a firearm from a motor vehicle." AB 2443 (Assemblyman Andal). January 5, 1994, saw Senator Leslie introduce Senate Bill 11 which would create a new special circumstance making all murders of persons under 14 years of age death-eligible. SB 11.

In that same week, on January 7, 1994, Assemblyman Goldsmith introduced legislation that would also create a new section of death-eligible murder for any adult who "intentionally killed the victim by discharging a firearm." AB 15. Three days later, January 10, 1994, Assemblyman Johnson introduced Assembly Bill 17 which would expand the felony murder subsection for arson. Finally, on January 18, 1994, Senators Ayala and Presley and Assemblyman Andal co-authored and introduced legislation that would add two more felonies to the felony murder section ("carjacking" and false imprisonment),

standards to challenged aggravating factors even where unchallenged aggravating factors remained to make the defendant death eligible. *See, Arave v. Creech, supra,* 507 U.S. ___, 123 L.Ed.2d 188; *Espinosa v. Florida,* 505 U.S. ___, 120 L.Ed.2d 854; *Walton v. Arizona, supra,* 497 U.S. 639; Argument IA, *supra,* at 13-14.

The California court's second rationale in *Bacigalupo II* rests on its inventive new interpretation of the function and purpose of the aggravating and mitigating factors listed in section 190.3. The court concluded that the purpose and function of the aggravating factors under the California scheme was different from the purpose and function of the aggravating factors in other states. In California, these factors merely "direct the sentencer's attention to specific, provable, and commonly understandable facts about the defendant and the capital crime that might bear on [the defendant's] moral culpability." *Bacigalupo II, supra,* 6 Cal.4th at 476, quoting *People v. Tuilaepa, supra,* 4 Cal.4th at 595.

That interpretation has no application to petitioner's case. As noted above, prior to *Bacigalupo II,* the state court had not only repeatedly recognized the critical role played by aggravating factors, but it had time and time again held that the sentencing process under California law was "essentially equivalent" to the weighing process

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another "drive-by" category of murder (discharging a firearm from a vehicle), and yet another new category of murder – "The murder was committed under circumstances wherein the defendant knew, or reasonably should have known, that his or her act or acts would create a great risk of death to any person other than the victim." SB 1311.

in other states like Florida. *People v. Frierson, supra,* 25 Cal.3d at 180; *People v. Brown, supra,* 40 Cal.3d at 542-43. Florida, like Mississippi, is a "weighing" state in which aggravating factors play a critical role in the sentencing choice; therefore, the Eighth Amendment is violated if the sentencer is allowed to weigh vague aggravating factors. *Stringer v. Black, supra,* 117 L.Ed.2d at 382.[13]

Petitioner's jury was instructed on the weighing process as it has long been interpreted prior to petitioner's trial, not as it was reinterpreted in December, 1993, 6 years after petitioner's trial. In petitioner's case, the list of aggravating and mitigating factors did more than merely direct the jury's attention to relevant facts. The jury instructions and verdict forms made clear to the jury that it was to make its penalty decision by weighing the aggravating factors it found to exist with the mitigating factors it found to exist, on the basis of the list on which it had been instructed.

In order to follow these instructions, the jurors necessarily had to examine the evidence in light of the list of factors and decide which aggravating factors existed and which mitigating factors existed. For example, the jury had to decide whether "the circumstances of the crime" or "the age of the defendant" constituted aggravating factors in this case. Only then could it make the required comparison between aggravating and mitigating factors. This process is indistinguishable from the process the

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[13] In *Stringer,* this Court found it significant that the Mississippi Supreme Court had stated clearly that its sentencing scheme operated in the same manner as Florida's. *Stringer v. Black, supra,* 117 L.Ed.2d.

jury engages in in states such as Florida and Mississippi.[14] As in those states, the standards articulated in *Godfrey* must apply to the aggravating circumstances petitioner's jury was authorized to weigh in deciding if he should die.

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[14] Thus, the sentencing process in petitioner's case is not at all comparable to the process in Georgia, in which the finding of an aggravating circumstance "does not play any role in guiding the sentencing body in the exercise of its discretion." *Zant v. Stephens, supra,* 462 U.S. at 874. Indeed, even if it were, the constitutionality of the California scheme would be questionable. In *Zant,* this Court upheld the Georgia capital punishment scheme despite the fact that it gave the jury complete discretion to select the penalty as long as one or more aggravating factors had been proven. In doing so, the Court relied on the two aspects of the Georgia scheme: the aggravating circumstances performed the required role of narrowing the category of persons who were eligible for the death sentence, and the Georgia Supreme Court reviewed every death sentence to ensure that it was not arbitrary, excessive or disproportionate. *Id.* at 875-79.

In contrast to these significant protections against arbitrary and capricious imposition of the death penalty in Georgia, the current California category of death-eligible offenses is extremely broad (*see* footnote 12, *supra*) and the California Supreme Court does *not* perform proportionality review. *People v. Andrews,* 49 Cal.3d 200, 234, 776 P.2d 285 (1989); *People v. Webb,* 6 Cal.4th 494, 536, ___ P.2d ___ (1993). Absent a constitutional role for the factors set forth in section 190.3, the California scheme contains *neither* of the safeguards which this Court deemed critical in upholding the Georgia statute.

II. The Application of Aggravating Factors (a), (b) and (i) in Petitioner's Case Violated the Eighth Amendment's Prohibition against the Arbitrary and Capricious Imposition of Capital Punishment

As previously discussed, petitioner's jury was instructed in accordance with California Penal Code section 190.3 that, in determining whether to impose a death sentence, it must weigh the aggravating and mitigating factors listed in the statute.

As more fully discussed below, as applied to petitioner's case, factors (a), (b) and (i) are unconstitutionally vague under the Eighth Amendment.

A. Factor (a), by Which the Jury Was Directed to Separately Weigh the "Circumstances of the Crime" as a Factor in Determining Whether Petitioner Should Live or Die, Violated the Eighth Amendment Because it Increased the Risk of Arbitrary and Capricious Application of the Death Penalty

In order to minimize the risk of arbitrary and capricious application of the death penalty, a state's aggravating factors must furnish the sentencer with "clear and objective standards" that provide "specific and detailed guidance." *Lewis v. Jeffers, supra,* 497 U.S. at 774 (1990); *Godfrey v. Georgia, supra,* 446 U.S. at 428; *Gregg v. Georgia, supra,* 428 U.S. at 198; *Proffitt v. Florida,* 428 U.S. 242, 258 (1976).

Thus, an aggravating factor that instructs the sentencer to look at the circumstances of the crime to see

whether it was "heinous, atrocious and cruel" is unconstitutional. *Shell v. Mississippi,* 498 U.S. 1, (1990); *Clemons v. Mississippi, supra,* 494 U.S. 738; *Maynard v. Cartwright, supra,* 486 U.S. 356. Similarly, an aggravating circumstance that instructs the sentencer to look at the circumstances of the crime to see if it was "outrageously or wantonly vile, horrible or inhuman" is unconstitutional. *Godfrey v. Georgia, supra,* 446 U.S. at 428-33.

It follows from these cases that an aggravating factor that merely instructs the sentencer to look at the circumstances of the crime, without even attempting any definition, limitation or guidance, is even more vague. Indeed, in several cases this Court has held that a sentencer may not simply look at the circumstances surrounding a crime and determine that a death penalty is appropriate. *See, e.g., Maynard v. Cartwright, supra,* 486 U.S. at 363; *Godfrey v. Georgia, supra,* 446 U.S. at 429-33; *Furman v. Georgia, supra,* 408 U.S. 238. As *Maynard* stated, this Court has "plainly rejected the submission that a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty." 486 U.S. at 363.

In petitioner's case, the jury had no guidance whatsoever in making the critical decision whether the "circumstances of the crime" should be weighed as an aggravating factor in this case. As the Tenth Circuit has stated in a similar context:

> We agree that all of the circumstances surrounding a murder must be examined to determine whether the murder was 'especially heinous, atrocious, or cruel,' but there must be some

> objective standard that specifies which circumstances support such a determination. Consideration of all the circumstances is permissible; reliance upon all of the circumstances is not. . . . The discretion of a sentencer who can rely upon all of the circumstances of a murder is as complete and as unbridled as the discretion afforded the jury in *Furman*.

Cartwright v. Maynard, 822 F.2d 1477, 1491 (10th Cir. 1987), *aff'd.*, 486 U.S. 356.

Similarly, in petitioner's case it would have been permissible for the jury to consider the circumstances of the crime in evaluating the existence of other, properly defined aggravating factors. What was impermissible was for the circumstances of the crime "without some narrowing principle to apply to those facts," in and of themselves, to serve as an aggravating factor the jury was authorized to weigh in the process that led to death.

To be sure, it is quite true that even if the bare language of an aggravating factor fails to provide constitutionally adequate guidance, the state may provide a constitutionally adequate limiting construction of the factor. *Arave v. Creech*, *supra*, 507 U.S. ___, 123 L.Ed.2d 188, 189. The California Supreme Court, however, has not provided a "limiting instruction" for the "circumstances of the crime" aggravating factor. Indeed, it has expressly kept open the reach of this aggravating factor, stating that it has not yet "explore[d] the outer reaches of evidence admissible as a circumstance of the crime." *People v. Edwards*, 54 Cal.3d 787, 835, 819 P.2d 436 (1991).

Absent a limiting construction, the use of a factor as unbounded as the "circumstances of the crime" is precisely what *Maynard* forbids. In the final analysis, if a sentencer may not weigh on death's side of the scale an unguided finding that a crime was "heinous, atrocious and cruel" or "outrageously or wantonly vile, horrible or inhuman," neither may it find – with no guiding principle whatsoever – that the "circumstances of the crime" constitute an aggravating factor to be put on death's side of the scale. This portion of the instructions violated the Eighth Amendment.

Further, the lack of a guiding instruction in petitioner's case created the unacceptable risk that the jury would find an aggravating factor on the basis of improper considerations of race and ethnic origin. Petitioner is Samoan; the murder victim was "white." RT 3:549-50. Without any limiting instruction, these racial facts are plainly circumstances of the crime, to which the jury was free to attach the "aggravating factor" label. Certainly there is not one safeguard whatsoever in the category "circumstances of the crime" that would have prevented, or minimized the risk of, such an arbitrary and capricious factor in the penalty determination. "Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate, but remain undetected." *Turner v. Murray*, 476 U.S. 28, 35 (1986).

B. Factor (b), Which Allowed the Jury at Petitioner's Trial to Weigh as an Aggravating Factor the "Presence or Absence of Criminal Activity by the Defendant which Involved the Use or Attempted Use of Force or Violence," Violated the Eighth Amendment Because, Absent Instructions Defining Elements of the Prior Crimes, It Allowed Arbitrary and Capricious Sentencing

In addition to the instruction on "the circumstances of the crime" under factor (a), the penalty jury at petitioner's trial was also authorized to consider as aggravation under factor (b) "[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." JA 61; RT 4:885. Without instructions on the elements of the purportedly relevant crimes, and clear definitions of "force" and "violence," the jury had no principled way to determine whether petitioner's alleged conduct was "criminal" or whether it involved "force" or "violence." Opinions on whether particular conduct is violent or criminal, and thus whether this factor is established, will vary from juror to juror, and, indeed, from jury to jury, resulting in a risk of arbitrary sentencing. The Eighth Amendment requires death penalty statutes to provide objective, specific guidelines when aggravating factors are used to control the sentencer's discretion. *Maynard v. Cartwright, supra,* 486 U.S. 356; *Godfrey v. Georgia, supra,* 446 U.S. 420. Where a capital punishment scheme uses aggravating factors which create a risk of arbitrary and capricious sentencing, those factors are unconstitutionally vague. *Gregg v. Georgia,* 428 U.S. 153, 189 (1976); *Maynard v.*

Cartwright, supra, 486 U.S. at 362-65; *Godfrey v. Georgia, supra,* 446 U.S. at 428.

Pursuant to this principle, state courts have invalidated statutory aggravating factors based on the defendant's prior criminal activity where these factors failed to provide the jury with clear guidelines. The Georgia Supreme Court held unconstitutionally vague an aggravating circumstance allowing the death penalty where "murder [is] committed by a person who has a substantial history of serious assaultive convictions." Ga. Ann. Code § 27-2534.1(b)(1); *Arnold v. State,* 224 S.E.2d 386 (Ga. 1976). The court found that the aggravating circumstance was constitutionally defective because it was "highly subjective." Likewise in Louisiana, that state's supreme court found vague an aggravating factor which allowed the jury to impose death based upon a "significant" history of criminal conduct. *State v. David,* 468 So.2d 1126, 1129-30 (La. 1985).

Finally, and similarly, in *State v. White,* 395 A.2d 1082 (Del. 1978), the Delaware Supreme Court held unconstitutionally vague an aggravating circumstance in which the victim was defined as "elderly" or "defenseless." The court held that those terms did not "have a common and ordinary meaning sufficiently definite to meet their usage in the context of the statute." *Id.* at 1090.

At petitioner's trial, evidence was introduced under factor (b) allowing the jury to impose death, at least in part, on the basis of "criminal activity by the defendant which involved the use or attempted use of force or violence. . . . " JA 61; RT 4:885. The trial court did not instruct the jury on the elements of potentially relevant

crimes nor on a definition of violence.[15] Absent some form of guiding instructions, the jury could not have determined whether or not petitioner's conduct constituted a violation of any penal statute or was otherwise "criminal."

Acknowledging the vagueness potential in factor (b), the California Supreme Court in *People v. Boyd, supra*, 38 Cal.3d at 774, unanimously held that conduct which was not violent in nature and which did not violate a penal section was irrelevant under factor (b). Regarding the "violent" prong, the court said, "The purpose of the statutory exclusion is to prevent the jury from hearing evidence of conduct which, although criminal, is not the type which should influence a life or death decision." The court has accordingly limited factor (b) to activity involving or threatening violence against persons and not mere property. *Id.* at 776. Likewise, concerning the "criminal" aspect of factor (b), it was and is "limited to conduct *that*

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[15] The only instruction petitioner's jury received regarding how to weigh this area of evidence was the following:

> Evidence has been introduced for the purpose of showing that defendant Tuilaepa has committed criminal acts which involved the express or implied use of force or violence or the threat of force or violence. Before you may consider any of such criminal acts as an aggravating circumstance in this case, you must first be satisfied beyond a reasonable doubt that the defendant did in fact commit such criminal acts. You may not consider any evidence of any other criminal acts as an aggravating circumstance.

JA 61-62; RT 4:886. *See* 1 California Jury Instructions, Criminal (CALJIC) 8.84.1.2 (5th Ed. 1983).

violates a penal statute." People v. Wright, 52 Cal.3d 367, 425, 802 P.2d 221 (1990) (emphasis in original).

Recognizing the prejudice if the factor is not so limited, the court observed that "[w]hen the prosecution is permitted to introduce such evidence the penalty trial can become a spectacle in which witnesses recount numerous trivial incidents of misconduct and ill temper." *People v. Boyd, supra*, 38 Cal.3d at 774. In the present case, however, the uninstructed jurors were free to impose the death penalty on the basis of any conduct that struck them as "criminal" and "violent."[16]

For these reasons, in petitioner's trial, factor (b) did not constitute the type of "objective standard" that properly channeled the sentencer's discretion. Factor (b) necessarily allowed each juror to impose the death penalty based on that juror's idiosyncratic assessment of what the factor permitted and what constituted criminal and/or violent conduct. And in petitioner's case a large portion of the factor (b) evidence was, as a matter of California

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[16] This case is an example of the type of "spectacle" which can result from the lack of a channeling instruction. The state supreme court itself found that several incidents did not involve "violent criminal" activity. JA 90-92; *People v. Tuilaepa, supra*, 4 Cal.4th 569, 589-91. The improperly admitted Youth Authority incidents were described by the court as being "outbursts," "angry retorts," "property damage," and, possession of unidentified "gang contraband." (Outside the jury's presence, the contraband was described as "lots of gang writings," and nothing more.) RT 4:670. Likewise, the court found irrelevant testimony that the outbursts occurred in "maximum security" CYA facilities. JA 92; *id.* at 591. *See also* RT 4:728-29.

law, neither criminal nor violent. Unfortunately, the jury did not know that.

This is the precise type of arbitrary and capricious sentencing that *Godfrey* and *Maynard*, as well as *Arnold* and *White* of sister states, all make clear is forbidden by the Eighth Amendment. Absent instructions defining the elements of the relevant criminal activity and the meanings of "force" and "violence," or other limiting instructions, reliance on factor (b) as a basis for imposing the death sentence was unconstitutional under the Eighth Amendment.

C. Factor (i), which Instructed the Jury To Weigh the "Age" of Petitioner in Deciding between Punishments of Life and Death, Was Vague, Overbroad and Illusory, thereby Violating the Eighth Amendment's Prohibition against Arbitrariness

Factor (i), which allowed the jury to weigh in aggravation the "age" of the defendant at the time of the crime, is the third impermissibly vague aggravating factor tainting the penalty determination and petitioner's judgment of death. This factor is so vague and overbroad that petitioner's jury surely had to guess its meaning.

The California Supreme Court has construed factor (i) as a potential aggravating circumstance of extraordinary breadth and flexibility. In one of the first cases to treat a challenge to the age factor, the court agreed with the defendant that "mere chronological age, a factor over which one can exercise no control, should not of itself be deemed to be an *aggravating* factor." *People v. Rodriguez*,

42 Cal.3d 730, 789, 726 P.2d 113 (1986) (emphasis in original).

The following year, in *People v. Ghent*, 43 Cal.3d 739, 775, 739 P.2d 1250 (1987), the court held that the prosecutor could rely on "age" to comment on the absence of a mitigation factor:

> The prosecutor's remarks here reasonably may be viewed as merely arguing the inapplicability of a mitigating factor, rather than seeking to penalize defendant by reason of his age. No good reason appears for depriving the prosecutor of the opportunity to argue that certain otherwise mitigating factors are not present in the case.[17]

Finally, and most importantly, the state supreme court has held that "age" may indeed be an aggravating factor and has defined its scope as follows:

> In our view, the word "age" in statutory sentencing factor (i) is used as a metonym for any age-related matter suggested by the evidence or by common experience or morality that might reasonably inform the choice of penalty. Accordingly, either counsel may argue any such age-related inference in every case.

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[17] Perhaps on the basis of *Rodriguez* and *Ghent*, this Court itself characterized California as one of 29 states "specifically designating the defendant's age as a mitigating factor in capital cases." *Sanford v. Kentucky*, 492 U.S. 361, 375-76 fn.5 (1989).

People v. Lucky, 45 Cal.3d 259, 302, 753 P.2d 1052 (1988); *People v. Tuilaepa, supra*, 4 Cal.4th at 595.[18] And recently, that court, relying on *Lucky*, has stated "[I]n a given case, the prosecution may argue age is an aggravating factor, and the defense may argue it is mitigating. It is up to the jury to decide. That is the nature of the adversarial process." *People v. Edwards, supra*, 54 Cal.3d at 844. If the jury in petitioner's case understood "age" to mean what the California Supreme Court said it meant in *Lucky*, then the jury had no guidance at all with which to apply the "age" factor.[19]

The state court's broad construction of factor (i) has not in any way minimized the risk of an arbitrary death judgment based upon "age" and has led to this becoming an all-purpose aggravating factor. Exemplifying how the factor has been manipulated to suit any case, we see that in *Tuilaepa*, the prosecutor argued that the 21-year-old petitioner was "old enough to know better" than to kill.[20] Another defendant was also "old enough to know better"

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[18] "Metonym" is defined by Funk & Wagnalls *Standard Dictionary* as "a word used as a substitute for another." "Metonym" is defined as "a figure of speech that consists in the naming of a thing by one of its attributes, as 'the crown prefers' for 'the king prefers.' " The question for petitioner's jury was not what it preferred, but what it understood.

[19] The jury was not instructed as to the limitation suggested by *People v. Rodriguez, supra*, 42 Cal.3d at 789, i.e., that factor (i) did not authorize aggravation on the basis of "mere chronological age."

[20] Contrasted with the prosecutor's approach in petitioner's case, in the companion case herein, the trial prosecutor stipulated that the age of that petitioner (20 years old) was a mitigating factor. *Proctor v. California*, 93-5161; RT 1479 (*Proctor*).

at 26 years of age. *People v. Sandoval*, 4 Cal. 4th 155, 189, 841 P.2d 862 (1992). The 30-year-old defendant in *People v. Caro*, 46 Cal.3d 1035, 1062 fn.13, 761 P.2d 680 (1988), was "old enough to know better." The 31-, 34- and 56-year-old defendants were described to their juries as being "old enough to know better" than to kill or do the harm for which they were convicted. *People v. Babbitt*, 45 Cal.3d 660, 716, 755 P.2d 253 (1988) (31-year-old); *People v. Brown*, 46 Cal.3d 432, 456, 758 P.2d 1135 (1988) (34-year-old); and *People v. Douglas*, 50 Cal.3d 468, 538, 788 P.2d 640 (1990) (56-year-old).

Indeed, the 19-year-old defendant in *People v. Belmontes*, 45 Cal.3d 744, 805-06, 755 P.2d 310 (1988), also was "old enough that he has to take responsibility for his own actions . . . ," and, finally, a 19-year-old had "30 or 40 [years] in terms of his experience on the side of criminal activity. . . . And his prior juvenile record stands for that proposition." *People v. Burton*, 48 Cal.3d 843, 865 n.8, 771 P.2d 1270 (1989). In practice, prosecutors are able to argue arbitrarily which murderers are "old enough to know better," demonstrating the illusory nature of this factor.

Given that practice, factor (i) is an aggravating circumstance in almost any murder case against almost any defendant. Such an application places factor (i) in direct violation of the Eighth Amendment's principles in that the factor on its face, without limiting or channeling direction to the jury, fails to differentiate among defendants. "If the sentencer could fairly conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm." *Arave v. Creech, supra*, 507 U.S. ___, 123 L.Ed.2d at 200.

CONCLUSION

As applied in petitioner's case, California Penal Code § 190.3 is vague and imprecise and, therefore, arbitrary and capricious under the Eighth Amendment. Petitioner's death judgment is a result of a constitutionally invalid process and his case must be remanded for consideration consistent with the Eighth Amendment principles set forth by this Court in *Godfrey* and its progeny.

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APPENDIX

§ 190.2. [Penalty upon finding special circumstance]

(a) The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found under Section 190.4, to be true:

(1) The murder was intentional and carried out for financial gain.

(2) The defendant was previously convicted of murder in the first degree or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed murder in the first or second degree.

(3) The defendant has in this proceeding been convicted of more than one offense of murder in the first or second degree.

(4) The murder was committed by means of a destructive device, bomb, or explosive planted, hidden or concealed in any place, area, dwelling, building or structure, and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.

(5) The murder was committed for the purpose of avoiding or preventing a lawful arrest or to perfect, or attempt to perfect an escape from lawful custody.

(6) The murder was committed by means of a destructive device, bomb, or explosvie that the defendant mailed or delivered, attempted to mail or deliver, or cause to be mailed or delivered and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.

(7) The victim was a peace officer as defined in Section 830.1, 830.2, 830.3, 830.31, 830.35, 830.36, 830.4, 830.5, 830.5a, 830.6, 830.10, 830.11 or 830.12, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a peace officer as defined in the performance of his duties; or the victim was a peace officer as defined in the above enumerated sections of the Penal Code, or a former peace officer under any of such sections, and was intentionally killed in retaliation for the performance of his official duties.

(8) The victim was a federal law enforcement officer or agent, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a federal law enforcement officer or agent, engaged in the performance of his duties; or the victim was a federal law enforcement officer or agent, and was intentionally killed in retaliation for the performance of his official duties.

(9) The victim was a fireman as defined in Section 245.1, who while engaged in the course of the performance of his duties was intentionally killed, and such defendant

knew or reasonably should have known that such victim was a fireman engaged in the performance of his duties.

(10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding, and the killing was not committed during the commission, or attempted commission or the crime to which he was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his testimony in any criminal proceeding.

(11) The victim was a prosecutor or assistant prosecutor or a former prosecutor or assistant prosecutor of any local or state prosecutor's office in this state or any other state, or a federal prosecutor's office and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.

(12) The victim was a judge or former judge of any court of record in the local, state or federal system in the State of California or in any other state of the United States and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.

(13) The victim was an elected or appointed official or former official of the Federal Government, a local or State government of California, or of any local or state government of any other state in the United States and the killing was intentionally carried out in retaliation for or to prevent the performance of the victim's official duties.

(14) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity, as utilized in this section, the phrase especially heinous, atrocious or

cruel manifesting exceptional depravity means a conscienceless, or pitiless crime which is unnecessarily torturous to the victim.

(15) The defendant intentionally killed the victim while lying in wait.

(16) The victim was intentionally killed because of his race, color, religion, nationality or country of origin.

(17) The murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit the following felonies:

(i) Robbery in violation of Section 211.

(ii) Kidnapping in violation of Sections 207 and 209.

(iii) Rape in violation of Section 261.

(iv) Sodomy in violation of Section 286.

(v) The performance of a lewd or lascivious act upon person of a child under the age of 14 in violation of Section 288.

(vi) Oral copulation in violation of Section 288a.

(vii) Burglary in the first or second degree in violation of Section 460.

(viii) Arson in violation of Section 447.

(ix) Train wrecking in violation of Section 219.

(18) The murder was intentional and involved the infliction of torture. For the purpose of this section torture

requires proofs of the infliction of extreme physical pain no matter how long its duration.

(19) The defendant intentionally killed the victim by the administration of poison.

(b) Every person whether or not the actual killer found guilty of intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or assisting any actor in the commission of murder in the first degree shall suffer death or confinement in state prison for a term of life without the possibility of parole, in any case in which one or more of the special circumstances enumerated in paragraphs (1), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), or (19) of subdivision (a) of this section has been charged and specially found under Section 190.4 to be true.

The penalty shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5.

§ 190.3. [Determination as to penalty of death or life imprisonment]

If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the Military and Veterans Code or Sections 37, 128, 219, or 4500 of this code, the trier of fact shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter

relevant to aggravation, mitigation and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.

However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and acquitted. The restriction on the use of this evidence is intended to apply only to proceedings pursuant to this section and is not intended to affect statutory or decisional law allowing such evidence to be used in any other proceedings.

Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced without such notice in

rebuttal to evidence introduced by the defendant in mitigation.

The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California.

In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant was reasonably

believed to be a moral justification or extenuation for his conduct.

(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, of the affects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in a state rison [sic] for a term of life without the possibility of parole.